



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-98-5

### FACTS:

You are an elected member of a local School Committee. In addition, you are an unpaid member of the Board of Directors of a non-profit corporation ("the Non-Profit") which provides various services to your town's Public Schools as well as other schools in the area. You have requested an opinion from the Commission concerning whether, as a School Committee member, you may sign Schedules of Departmental Bills Payable (Schedules) prepared by the School Department for payment of vendors (including the Non-Profit) which provide goods or services to the school system.

The procedure for preparation of the Schedules is as follows. First, the vendor submits an invoice to the Office of the Superintendent. The invoice is examined by the administrative staff in the Superintendent's Office to ensure that it conforms to the relevant order/contract for services or goods. The invoice is then either approved for payment, adjusted for payment or returned unpaid to the vendor. In cases other than those in which the invoice is returned unpaid, the Superintendent's staff attaches an account number to the invoice and forwards it to the appropriate school administrator for review and approval. For example, invoices for special education services are forwarded to the Special Education Director. Once the appropriate administrator confirms that the services were performed and approves the invoice for payment, it is returned to the Superintendent's office and placed on a Schedule. The Schedule is then placed in the office of the School Committee and its members are advised that the Schedule is ready for signature. Town procedure requires the signature of three of the five members of the School Committee for approval. The School Committee does not vote on these Schedules, or, in the normal course, conduct any review or investigation of matters on the Schedule. Once three Committee members' signatures are obtained on the Schedule, the Superintendent's Office delivers the Schedule to the Town Accountant's Office. Each Schedule states immediately above the signatures of the Committee members, "To the Accounting Officer: The following named bills of the School Department have been approved by the School Committee, and you are requested to place them on a warrant for payment." The Town Accountant then creates a warrant for the payment of the accounts which is delivered to the Board of Selectmen. Three members of the Board of Selectmen must approve the warrant. Once these signatures are affixed to the warrant, it is delivered to the Town Treasurer who reviews the contents against account records and issues the payment check to the vendor.

### QUESTION:

As a School Committee member, may you sign Schedules of Departmental Bills Payable which include payments to the Non-Profit despite the fact that you sit on the Non-Profit's Board of Directors?

### ANSWER:

No, because in so doing you would be participating in a particular matter in which a business organization that you serve as a director has a financial interest, in violation of G.L. c. 268A, §19(a). We also take this opportunity to reconsider the reasoning of our opinion in

*EC-COI-87-32*, and to the extent it is inconsistent with our opinion announced today, we reverse *EC-COI-87-32*.

## DISCUSSION:

G.L. c. 268A, §19(a) provides in relevant part that “a municipal employee who participates as such an employee in a particular matter<sup>1/</sup> in which to his know-ledge he, his immediate family or partner, a business organization in which he is serving as an officer, director, trustee, partner or employee . . . has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.” It is clear that the payment of the Non-Profit’s invoice is a “particular matter” and that the Non-Profit, a business organization of which you serve as a director, has a financial interest in this particular matter. The question remains, however, whether your signing of the warrant constitutes “participation” in this particular matter within the meaning of the statute. In essence, this is a question of whether the action of each Committee member who signs the Schedules is personal and substantial or merely ministerial.

“Participation” is defined in G.L. c. 268A, §1(j) as

participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

The modifying terms “personally and substantially” are not further defined in the statute. When construing statutory language, we begin with the plain meaning of the statute. *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O’Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of “person- ally” from Webster’s Third New International Dictionary (unabridged) is “so as to be personal: in a personal manner: as oneself: on or for one’s own part.” The term “substantial” is defined as “existing as or in substance: material: important, essential.” *Accord*, Black’s Law Dictionary (6<sup>th</sup> Ed.).

Additionally, in its precedent, the Commission has relied on the interpretation of the federal Office of Government Ethics in construing the term “personal and substantial”, as the Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of interest statute, including the phrase “personal and substantial.” See Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962 at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in Congress; much of language of proposed conflict law taken and adopted from federal bill); *EC-COI-87-33* (expressly relying on federal regulation). By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has further described and clarified the phrase “personal and substantial participation” in a manner consistent with the dictionary definition, stating:

To participate ‘personally’ means directly, and includes the participation of a subordinate when actually directed by the former government employee in the matter. ‘Substantially,’ means that the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort.

In determining whether School Committee members “participate” in the particular matter of the payment of an item on the Schedule of bills payable, we look to the statutory scheme underlying the process. G.L. c. 41, §56 provides the basis for the procedure followed in your town, as outlined in the “Facts” section of this opinion. The statute provides in relevant part:

The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure. Such approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town . . . The town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same, and the treasurer shall pay no money except upon such warrant approved by the selectmen . . . The town accountant may disallow and refuse to approve for payment, in whole or in part any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant . . . (Emphasis added.)

As set forth above, the duty to determine that the charges are correct and that goods and services ordered were actually delivered or rendered falls on the “boards, committees, heads of departments and officers authorized to expend money,” in this case, the School Committee. Your town has established a system whereby the propriety of a given bill is determined by the administrator responsible for that matter and the final Schedule of accounts payable is thereafter forwarded to the School Committee for a final “sign-off” by a majority of members of the Committee. In essence, the School Committee has delegated to school administrators its responsibility under the statute to determine the correctness of all accounts payable. Upon receiving the assurance of the appropriate administrators that the charges are correct, the School Committee approves them, in the normal course, without further review or investigation. While this system may be reasonable and efficient for the conduct of school department business, we do not believe that it renders the actions of the Committee members merely ministerial. Where, by statute, it is the responsibility of the Committee to certify the correctness of accounts payable, the Committee’s decision to delegate this responsibility to school department staff cannot make the actions of the members of the Committee who signify their approval of the expenditures by signing the Schedules insubstantial. G.L. c. 41, §56 clearly gives the members not only the power to approve bills which are correct, but the concomitant power to disapprove those bills which are not correct. Such power, whether exercised or not, implies discretion and judgment, and removes the signing of the Schedules from the realm of the ministerial.

We take this opportunity to reconsider our ruling in *EC-COI-87-32*. In that opinion, the Commission considered whether members of a Fire District Prudential Committee could sign a payroll warrant for firefighters where three Committee members had immediate family members who were on the payroll. The authorization process in that case required the fire chief (who was not a member of the Committee) to review and approve the accuracy of the payroll and to verify the hours in which each firefighter performed services during the payroll period. The Commission concluded that the Committee members may properly sign the payroll warrants, stating:

In this case the signing of the warrant is peripheral to the determination of the correctness of the hours worked. It is the fire chief and not the Committee who certifies the hours of each firefighter. If the hours are certified by the fire chief, the firefighter is entitled to the appropriate compensation. The signing of the warrant which authorizes the paycheck is therefore ministerial and cannot be characterized as substantial.<sup>2/</sup> If the number of hours certified by the fire chief became an issue or the subject of dispute, however, then the signing of the warrant by any member of the Committee could constitute substantial participation. In such a case abstention will generally be required if the dispute concerns an immediate family member. See G.L. c. 268A, §19.

The function of a fire district prudential committee, at least as to the question of expenditure of funds, is equivalent to the function of the selectmen as to town funds. G.L. c. 48, §72 provides: "Such [fire] districts shall choose a prudential committee, which shall expend, for the purposes prescribed by the district, the money so raised or borrowed, and shall choose a treasurer, who shall give bond for the faithful performance of his official duties in a sum and with sureties approved by the prudential committees. He shall receive all money belonging to the district, and shall pay over and account for the same according to its order or that of the prudential committee."

As is clear from our opinion in *EC-COI-87-32*, the prudential committee's power to expend funds necessarily implies the power to withhold funds for questioned or disputed items. Indeed, as to selectmen, that power is statutorily explicit. G.L. c. 41, §52 provides, in relevant part, that selectmen may "disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful, or excessive . . ." In *Treasurer of Rowley v. Rowley*, 393 Mass. 1 (1984), the court considered a claim by a town treasurer that he had the right to disallow a payment authorized by the selectmen which he considered improper. The court contrasted the statutory duty of the selectmen to disallow certain payments under §52 with the limited powers of the treasurer under G.L. c. 41, §35 which it deemed "largely ministerial" and held that the treasurer was without authority to withhold payment. *Id.* at 7, quoting *Graton v. Cambridge*, 259 Mass. 310, 314 (1927). *Accord*, *Weiner v. Boston*, 342 Mass. 67, 69 (1961); *Lenox v. City of Medford*, 330 Mass. 593 (1953); *King v. Mayor of Quincy*, 270 Mass. 185, 187 (1930).

In essence, once the prescribed procedure has been followed by a city council or town board of selectmen or a prudential committee, the treasurer's duty to disburse funds is mandatory and not discretionary, and therefore is simply ministerial. The power of city councillors, town selectmen or prudential committee members to approve payment warrants, however, includes a large measure of discretion. For this reason, we do not consider the approval of payment warrants by members of such bodies to be ministerial. Rather, such approval is significant and important to the particular matter, and therefore "participation" within the meaning of the G.L. c. 268A, §1(j).<sup>3/</sup> We conclude, therefore, that individuals who sit on such bodies, or other bodies capable of authorizing expenditures, may not participate in any particular matter, including the approval of payment warrants, where such participation implicates a financial interest under G.L. c. 268A, §19. We note that *EC-COI-87-32* was explicitly limited to the certification of a payroll by an appointing authority which does not actively supervise employees. We recognize, however, that the reasoning of *EC-COI-87-32* is inconsistent with the reasoning of the opinion we reach in this case. Therefore, to the extent *EC-COI-87-32* is inconsistent with the opinion we announce today, we now reverse.

Based on the foregoing, we conclude that you may not approve (in this case, by signing) Schedules of accounts payable which include payments to the Non-Profit, because in so doing you would be participating personally and substantially in a matter in which a business organization that you serve as a director has a financial interest, in violation of G.L. c. 268A, §19 (a).

**Date Authorized:** June 9, 1998

1/ "Particular matter" is defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k).

2/ This opinion is limited to the certification of a payroll by an appointing authority which does not actively supervise employees. [Footnote in original.]

3/ Indeed, "through approval" comprises part of the statutory definition of "participate." G.L. c. 268A, §1(j).